SUPREME COURT, U. S.

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No. 804

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

LOUISVILLE & NASHVILLE RAILROAD CO., AND PENNSYLVANIA RAILROAD CO., ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Kentucky

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APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Appellants, American Trucking Associations, Inc., National Motor Freight Traffic Association, Inc., and National Tank Truck Carriers, Inc., for their reply to the brief of the railroad appellees herein,[1] say to this Honorable Court:

Preliminary

The brief of the rail appellees, in its broad outlines, construes the legislative history relating to enactment of Section 15a(3) of the Interstate Commerce Act, and the

[1] The appellees have filed a single brief in this case and those consolidated with it, Nos. 797, 808, and 809.

conclusions to be drawn therefrom, entirely differently than do these appellants. The same holds true with respect to the question of whether the Commission's decision has a rational basis. This is hardly surprising, and ordinarily we would file no reply. However, we deem it important to call the Court's attention to certain of the appellees' assumptions—not supported by the Commission's report—which they make, and which they misstate as Commission "findings" for the purpose of supporting their argument.

Appellees Have Misstated the Commission's Findings

The first of these misstatements (p. 3)[2] is that the "Interstate Commerce Commission found that the reduced rail rate of $5.11 per gross ton on ingot molds is required by the railroads if they are to effectively compete for the traffic." Turning to the citation furnished by appellees (A. 61-62), we find that the language they rely on begins with the phrase, which they somehow overlook: "According to consignee testimony." Thus, what the Commission "found"—to put it accurately—was no more than that the *consignee said* that the railroads could get the traffic only if they met the barge-truck rate. The appellees, we submit, have made an exceedingly poor "translation" of clear and simple English language in an effort to raise the Commission's recitation of the *consignee's* statement to the level of a Commission finding.

The second such misstatement (p. 3) is the claimed finding *by the Commission* that the reduced rail rate is "compensatory." The citation to the record (A. 62-63) reveals only that the Commission stated that "Division 2 then concluded that the rate was compensatory . . ."[3]

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[2] All page references herein, unless specifically indicated otherwise, are to the brief of railroad appellees.

[3] The word "compensatory," like most words, means many things to many people. The rail brief (pp. 25-27) notes the reference by several members of Congress to "compensatory" rates. We assume

The third such misstatement is the claimed Commission finding (p. 5) that the rail rate "would make a maximum contribution toward the railroads' constant expenses . . ." This "finding," to use the appellee's citation (A. 67), is apparently based on the following language in the Commission's report:

> . . . merely because a carrier is able, without incurring an out-of-pocket loss, to handle certain traffic at rates below fully distributed costs, *and perhaps by diverting sufficient tonnage from its regulated competitors to maximize thereby the contribution that such traffic would make to its overhead*, does not necessarily mean that the carrier is the more efficient of the two. (Emphasis ours)

A fair reading of the cited passage makes it clear that the Commission was doing no more than accepting, *arguendo*, the rails' hypothesis with respect to their reduced rate, and saying that, even so, their service was not shown thereby to be more "efficient" than the barge-truck service. It seems to us improper to state to this Court, as appellees have, that this constitutes a "finding" by the Commission in the form in which they have cast it. The balance of the claimed finding, "that the railroads would be better off with the reduction than without it" is also entirely devoid of support in the Commission's report.

The appellees have thus created findings not made by the Commission and relied on them to buttress their argument. This same technique is followed elsewhere in their brief. See, for example, the statement at page 10, that the Commission found "the railroads' reduced rate

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the appellees mean to imply that the use of this word by the Congressmen in question connotes their approval of out-of-pocket cost ratemaking. Since we lack the ability to know what they meant by "compensatory," we content ourselves in the knowledge that the appellees are probably no more skilled at mind reading than are we. We would only add that—if Congress meant to use the word as the appellees apparently construe it—it would have been a simple matter to so define it and include it in the legislation it enacted.

compensatory; not detrimental—but actually beneficial—to the railroads' revenue needs; and required for effective competition, . . ." And, again, their reiteration (p. 16) that "[h]ere, as the Commission found, the reduced ingot molds rate, by attracting traffic, will increase the contribution to the railroads' constant expenses, . . ."

Any pleader is entitled to make the most he properly can out of any factors he considers favorable to his cause and make a reasonable interpretation of ambiguous language. Unfortunately, that is not the case here; appellees have simply indulged in wishful thinking, and, in turn, attempted to support their ratemaking philosophy by conjuring up "findings" which the Commission did not, in fact, make.

Even had the Commission made the finding attributed to it by appellees, it would have cast no doubt on the Commission's power (1) to use full cost to determine which of the competing modes has the inherent cost advantage and (2) to restrain the railroads from maintaining rates below the full cost of the low cost mode in order to recognize and preserve to the latter its inherent advantage.

The Testimony of Rail Economists Was Controverted and the Commission Was Not Obliged to Adopt It

In their ardor to support their contention that rates based on out-of-pocket costs are the only proper criteria for determining which of two competing transport modes has the "inherent advantage," the appellees again misstate the facts in their claim that the testimony of the economists whom they presented was "uncontroverted" (p. 10), or "not refuted" (p. 33).[4] *This simply is not so.* As

[4] The rail brief (p. 36, n. 78) also refers to the 1966 Report of the Council of Economic Advisers and the 1957 Report of the Royal Commission on Canada's Economic Prospects. Assuming, as the railroads claim, that these reports support their ratemaking philosophy, we weren't aware that either of these groups played any part in the enactment, in 1958, of Section 15a(3) of the Interstate Commerce Act.

we noted in our original brief (p. 20, n. 21) there was "countervailing testimony. See that of Witness Steiner, A. 178 *et seq.*, particularly A. 203-224." We would hardly expect appellees to embrace the testimony of the transportation economist presented by the barge lines. But we would expect them, at least, to admit his participation in the proceeding and his disagreement with the conclusions of their economists.

On the question of whether the findings of the Commission are sufficient to provide a rational basis for its ultimate conclusions and order, appellees quarrel at length with the merits of its refusal to accept as controlling the views expressed by their retained economists (pp. 32-43). The lower court agreed with those witnesses and substituted its judgment for that of the Commission as to the controlling significance thereof. Such a course is clearly beyond the function of a reviewing court. There would appear to be no reason to argue that proposition further.

We note in conclusion on the question of rationality that appellees make no effort to dispute the logic of the reasons on which the Commission rested its ultimate conclusions and order. Those reasons are set forth in the brief of these appellants (pp. 20-24) and we rest our case on what we there said.

The Commission Found the Rail Rate Predatory

Appellees refer (p. 43, n. 102) to our contention, also made by other appellants, that "the opinion of the court below will enable the railroads to destroy their intermodal competitors." In addition to characterizing this contention as "false and misleading," appellees allege a "total absence of any findings by the Commission that the ingot molds reduction is predatory or maliciously conceived." [5] We have previously noted, in another context, the appel-

[5] See also (p. 6) the contention that "There is no finding . . . [that the rail rate is] predatory in the sense that it is aimed at the destruction of a competitor or involves unfair pricing practices."

lees' "exceedingly poor translation of clear and simple English language" in the Commission's report. Here the reverse is true. Appellees seem singularly unable or unwilling to recognize the import of equally clear language in the Commission's report. Referring to the conclusion of Division 2 that the barge cost advantage would enable the water carriers to reduce their rates and still be able to compete effectively, the Commission said (A. 71):

> Nothing in that report suggests that such a reduction in the rate of the barge-motor lines cannot be matched by successive reductions in the railroad rates. The railroad out-of-pocket costs are lower than the barge-motor lines' variable costs. Therefore, the railroads can wage the rate battle as long as or longer than the barge-motor lines. The rationale of the division's report would permit no ground upon which the Commission would be able to intercede to halt such a devastating rate war. While this may give full rein to the "play of competition," 323 I.C.C. 758, 764, it is difficult, if not impossible, to comprehend how it would accord recognition and preservation of inherent advantages as contemplated by the national transportation policy.
>
> In short, by reducing its rate below the level of the barge-truck full costs, the respondent railroads have unlawfully impinged upon the ability of the barge-truck mode competitively to assert its inherent cost advantage. . . .

Short of using the exact word, we submit that this portion of the Commission's report could hardly more clearly state the conclusion that the railroad rate involved, in transportation parlance, is "predatory" in the sense that it constitutes an unfair or destructive competitive practice proscribed by the National Transportation Policy.

The Rail Claims Regarding Motor-Carrier Taxation and Their Right-of-Way Cost "Disability" Are Erroneous

The appellees' brief (pp. 11, 12, 45, 46, 47) repeatedly claims that their water and motor competitors use "Gov-

ernment supplied rights-of-way, either free or without the payment of adequate user charges."[6] Insofar as their claim that motor carriers use highways at "inadequate user charges" is concerned, the railroads substitute their own *ipse dixit* for fact. The only impartial public studies ever made of the adequacy of truck highway use tax payments on a national basis found that they paid more than their fair share. This was the conclusion of a study conducted by Joseph B. Eastman, Federal Coordinator of Transportation. Public Aids to Transportation, Vol. IV (1940). A later study by the Bureau of Public Roads, submitted to Congress March 24, 1965,[7] found that trucks paid more than their fair share of federal highway costs in the form of use taxes. Surely, appellees are familiar with these studies.

Information received from the various States and collated by ATA's Department of Research and Transport Economics, and contained in the publication "Truck Taxes by States," shows total truck highway user taxes paid to the States of $2.465 billion in 1966. Federal highway user taxes paid by trucks for the same year totaled $1.707

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[6] Appellees acknowledge, at least tacitly, that trucks pay taxes for highway use, but, without citing any evidence—much less record evidence—make the claim that they are inadequate. Aside from the slipshod nature of this type of argument, we think it comes with singularly poor grace from the recipients of the greatest largesse ever bestowed upon any mode of transport, in the form of grants equalling almost 10% of the total land area of the United States (excluding Alaska)—much of it containing valuable oil and mineral rights—plus a great variety of state and municipal "plums," such as contributions of cash, subscriptions to and guarantees of railroad bonds, materials, equipment, construction labor, securities, tax exemptions, and the use of city streets at grade, free of any costs. Public Aids to Transportation, Vol. II—Aids to Railroads and Related Subjects, U.S. Federal Coordinator of Transportation (1938). Even today, of course, railroads are given public subsidy in the form of tax relief and outright payments by the federal, state and municipal goverments, largely in connection with commuter transportation.

[7] Supplementary Report of the Highway Cost Allocation Study, House Doc. No. 124, 89th Cong., 1st Sess.

billion, for a total figure of $4.172 billion paid in highway user taxes only. This figure, of course, does not include a myriad of other non-highway-user taxes, state, local, and federal, such as income, real property and sales taxes.

While appellees are *technically* correct in their claim (p. 46), that "the cost of such [highway] facilities [is] not included in [motor carriers'] out-of-pocket costs," the fact is that the very large sums paid in taxes for the use of such facilities *is* included in motor carrier out-of-pocket costs. Thus the rail "disability of paying for their rights-of-way" is matched, and far more than matched,[8] by the similar "disability" incurred by motor carriers by the payment of highway user taxes.

Appellees Confuse the Concept of Pricing Floors

The appellees repeatedly refer to "full cost floors" in the discussion contained at pages 21-29 of their brief, and thus do not distinguish between using full cost of the proponent of a rate as a measure of compensativeness, and using full cost of the low cost mode as a means of determining when the rate of a higher-cost mode constitutes a destructive competitive practice. This is the use the Commission made of full costs in the instant case, and we submit that such use is consistent with this Court's *New Haven* decision. This confused discussion in appellees' brief throws no light on the question of statutory interpretation, i.e., whether the Commission has power to use full cost as it did, but does indicate how little merit, when tested by logic and relevance to the issues, there is in what appellees say.

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[8] Total railroad taxes *of all kinds* paid to the federal, state, and municipal governments in 1965, the latest year for which the figure is available, were only $915 million. Transport Statistics in the United States (I.C.C.), Part I, page 22, Table 107.

Appellees Have Ignored a Significant Holding in This Court's *New Haven* Decision

Finally, we wish to call the Court's attention to the complete failure of appellees to take issue with the contention, made in our original brief (pp. 17-20)[9] that "this Court's *New Haven* decision anticipated *exactly* the situation here involved and established a guidepost which the court below ignored." Nowhere in their 48-page brief do the appellees take any issue with this proposition. Their failure so to do amounts, we submit, to a concession of its validity.[10]

Comment on Brief of the United States

The fact that these appellants did not receive the government's brief until late in the day (April 15), combined with the setting of argument for April 23, has restricted our opportunity to give other than cursory treatment to the government's brief. Our brief in reply to that of the rail appellees (the material preceding this heading) went to the printer within an hour or two of receipt of the government's brief. The short time remaining before argument herein prevented redrafting to fully extract and answer, independently, the contentions raised in the brief of the United States.

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[9] The brief of rail appellees (p. 41) erroneously describes that portion of our brief as an argument that the "Commission's reference to *New Haven* supplies a rational basis for comparing 'fully-distributed costs' to determine low-cost advantage." Our argument dealing with the rationality of the Commission's decision is contained at pages 20-24 of our brief.

[10] In *American Trucking Ass'ns.* v. *United States*, 364 U.S. 1 (1960), this Court overturned an I.C.C. decision granting substantial rights to a railroad's motor subsidiary. A small portion of the total grant, it noted, had "been submerged in the * * * broader permit * * *." The Court (*Id.*, 17) said:

> [Rail] [a]ppellees maintain that there was such justification [for the grant], and [motor carrier] appellants have not established that it was lacking. Nor do we perceive any other reason to upset this award. Consequently, we affirm with respect to this particular permit.

In any event, the brief of the United States concentrates largely on two points: (1) that the Commission chose the wrong standard in determining which of the two competing transport modes possessed the inherent advantage of low cost, and should, instead, have used the standard of comparison favored by the Department of Justice, i.e., out-of-pocket rather than fully-distributed, cost;[11] (2) that the Commission gave no "sound justification" for its use of the fully-distributed cost standard. As to the first proposition, we need merely point out that it is the Commission which has the primary obligation, as well as the administrative expertise, to make the choice. As to the second, the argument, in essence, is that the Commission's decision lacks a rational basis.[12] For answer to this, we refer the Court to our original brief on the merits (pp. 20-24).

Respectfully submitted,

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[11] We note the government's claim (p. 17, n. 6) that the Department of Transportation "strongly supports the view of the district court," etc. In this connection see our comment, *supra*, p. 4, n. 4 relative to a similar claim by rail appellees.

[12] This is also true of the government's contention (p. 15) that the Commission did not rebut, by "specific analysis," the testimony "advanced by four distinguished economists" presented by the railroads.

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 17th day of April, 1968, I served copies of the foregoing document on the several parties hereto, in duly-addressed envelopes, with postage prepaid, as follows:

1. On Honorable Erwin R. Griswold, The Solicitor General, Department of Justice, Washington, D.C. 20530, and on Donald F. Turner, John H. D. Wigger, and Robert Johnson, Esqs., Department of Justice, Washington, D. C. 20530.

2. On Robert W. Ginnane, Esq., General Counsel, and Leonard S. Goodman, Esq., Assistant General Counsel, Interstate Commerce Commission, Washington, D. C. 20423.

3. On Harry C. Ames, Jr., Esq., 529 Transportation Building, Washington, D. C. 20006, J. Raymond Clark, Esq., 743 Investment Building, Washington, D. C. 20036, and A. Alvis Layne, Pennsylvania Building, Washington, D. C. 20004, counsel for appellant barge lines.

4. On Carl Helmetag, Jr., Esq., Six Penn Center Plaza, Philadelphia, Pa. 19103, Elbert R. Leigh, Esq., 908 West Broadway, Louisville, Ky. 40201, and Harry J. Breithaupt, Jr., Esq., 929 Transportation Building, Washington, D. C. 20006, counsel for appellees.

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